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No. 323.

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Supreme Court of the United States

OCTOBER TERM, 1915.

PACIFIC MAIL STEAMSHIP COMPANY, *Petitioner,*

vs.

ED. SCHMIDT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

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SUPPLEMENTAL BRIEF FOR PETITIONER.

I.

This case does not fall within Amended Section 4529, Rev. Stat., because the Steamship Company had discharged its obligations to libelant under the Articles of Shipment signed by him on July 24, 1913, and because the subsequent implied contract upon which libelant's cause of action arose was not within the statute.

The fundamental error of the lower courts consists in practically making a new contract for the parties, by extending it beyond the period specified therein.

(a) *The Shipping Articles Covered the Voyage Specified Therein Only.*

The shipping articles signed by libelant on July 24, 1913, covered a specified voyage only, the engagement being

limited to *not exceeding* six months, but the *exact duration* thereof being necessarily dependent upon the time it took to complete the voyage.

Said shipping articles recite that they are "Articles of Agreement between Master and Seaman in the Merchant Service of the United States required by Act of Congress Title LIII, Revised Statutes of the United States." (Rec., 31.)

The character of such articles is specified in Section 4511 of said Chapter, which Section, in brief, provides that "the master of every vessel *bound from a port in the United States to any foreign port,*" etc., "shall, *before he proceeds on such voyage,* make an agreement, *in writing or in print,*" etc., which agreement, among other things, is required to contain the following particulars:

> "First. The nature, and as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate."

The provisions of this section were made applicable to the shipment of crews by Shipping Commissioners for *vessels engaged in the coastwise trade* by the Act of August 19, 1890, chap. 801 (26 Stat. 320), as amended by the Act of February 18, 1895, chap. 97 (28 Stat. 667).

> *Inter-Island Steam Nav. Co.* v. *Byrne,* — U. S. —, (decided by this court December 20, 1915).

Manifestly, the *voyage* is the thing which the agreement is to cover. The voyage is to be described with particularity in the agreement, and the *port of final discharge* is expressly required to be stated, but the *duration* of the "intended voyage or engagement" is only required to be given *"as far as practicable"*, Congress recognizing the fact that the exact time when the voyage would be completed would necessarily depend upon the uncertainties of weather and trade.

In *The C. F. Sargent,* 95 Fed. 179, certain seamen had bound themselves for a voyage and term described in the shipping articles signed by them as follows:

> "From the port of Tacoma to Honolulu, H. I., and back to San Francisco, Cal., as a final port of discharge, either direct, or via one or more ports on the Pacific Coast, *for a term of time not exceeding nine calendar months.*"

Of this provision, (which is practically identical, except as to places, with the shipping articles in this case,) Judge Hanford said (*ib.*, p. 181):

> "This contract is worded to meet fairly and fully the requirements of section 4511, Rev. St. U. S., which prescribes that every agreement of seamen to serve in American vessels shall set forth definitely, among other things, "the nature and so far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate." *The Occidental,* 87 Fed. 485. This contract is certainly definite as to the duration of the engagement, and specifies the port of final discharge. It is a lawful contract, *broken by the libelants by their having quit the service of the ship before her arrival at San Francisco,* or the expiration of the term of nine months, without the master's consent; and the penalty for the breach of their contract is forfeiture of their wages."

In this case Judge Hanford recognized the right of the seamen to quit the service of the ship when the vessel arrived at the final port of discharge, treating the expression "for a term of time not exceeding nine calendar months", as being simply a limitation upon the right of the master of the vessel to hold the seamen if the voyage was not completed within that time.

In *The Falls of Keltie,* 114 Fed. 357, 359, Judge Hanford again had occasion to consider this precise point and held

that a like provision in the shipping articles there involved, which read—

> "From New York to Shanghai, thence, if required, to any ports and places within the limits of seventy-five degrees north and sixty-five degrees south latitude, trading to and fro *for a period not to exceed three years;* voyage to end at a port in the United States, the United Kingdom, or the continent of Europe, with liberty to call for orders if required"—

"must be construed as a contract for a voyage and not for a term of three years."

A like conclusion was reached by Judge Mayer, holding the District Court for the Southern District of New York, in *The City of Montgomery,* 210 Fed. 673.

See also Brief in Support of Petition for Writ of Certiorari, pp. 22-26, and decisions of the Circuit Court of Appeals for the Ninth Circuit there cited, to the effect that such an agreement is for a voyage, to wit:

> *The Mermaid,* 115 Fed. 13.
> *The Grace Dollar,* 160 Fed. 906.

That the phrase "for a term not exceeding----------" which appears in all these shipping articles, refers to the length of the voyage, is to be inferred from the language of Table A, which follows Sec. 4612, Rev. Stat., and *which gives the form of agreement required, "as near as may be," by Sec. 4511.* Said Table reads:

"TABLE A.

FORM OF ARTICLES OF AGREEMENT.

UNITED STATES OF AMERICA.

(Date and place of first signature of agreement, including name of shipping-office):

It is agreed between the master and seamen or mariners of the ----------, of which ---------- is at

present master, or whoever shall go for master, now bound from the port of--------, --------, to --------, --------, (here the voyage is to be described, and the places named at which the vessel is to touch, or if that cannot be done, *the general nature and probable length of the voyage is to be stated.)"*

The events which followed the return of the "City of Sydney" to San Francisco on September 24, 1913, show conclusively that both parties to the agreement here in question regarded such return as the completion of the contract and an end of those particular shipping articles. Thus said articles, (which are set forth in the record,) in the *"columns to be filled up at the end of the voyage,"* contain the following statements (Rec., 32):

> "Date of termination of voyage. 9/24/13."
> "Port at which voyage terminated. S. F."
> "Date of delivery of lists to shipping commissioner. 9/25/13."

Mr. Schmidt, the libelant, testified that on his return from this voyage (Rec., 12)—

> *"I got paid off* by the Shipping Commissioner, my wages due me *for that voyage."*

Such wages, according to the shipping articles, were $100 per month. (Rec., 32.)

Manifestly, the purpose of the Company in thus "paying off" the libelant through the Shipping Commissioner on the completion of the voyage was to discharge the obligation to that effect imposed upon it by Section 4529, Rev. Stat., as amended by the Act of December 21, 1898 (30 Stat. 756).

(b) *The Penalty prescribed by Sec. 4529 is only for a failure to pay a seaman his wages upon the conclusion of the Voyage covered by the Shipping Articles. The Statute does not deal with moneys earned by him while the vessel is in port, prior to his reshipment.*

The penalty imposed by that statute is only for a failure to pay a seaman his wages as provided therein, namely, *in the case of vessels making coasting voyages, "within two days after the termination of the agreement under which he shipped,* or at the time the seaman is discharged, whichever first happens;" and *in the case of vessels making foreign voyages,* or from a port on the Atlantic to a port on the Pacific or vice versa, *"within twenty-four hours after the cargo has been discharged,* or within four days after the seaman has been discharged, whichever first happens."

It is manifest that what Congress intended by this statute was that the seaman should be paid his wages for the voyage covered by the shipping articles promptly upon the conclusion of the same, and that if that be done the entire purpose of the statute is accomplished.

So, the succeeding section (Sec. 4530), as amended by the Act of December 21, 1898, chap. 28 (30 Stat. 756), provides for the payment of one-half part of the wages due a seaman at every port where the vessel shall receive or discharge cargo "before the voyage is ended unless the contrary is expressly stipulated in the contract; *and when the voyage is ended every seaman shall be entitled to the remainder of his wages which shall then be due him as provided in section forty-five hundred and twenty-nine of the Revised Statutes."*

The statute is not concerned with the wages earned by a seaman after he has been paid off under the shipping articles and while he is in the home port preparatory to

shipping on a new voyage. It deals only with the wages earned by the seaman during the voyage covered by the shipping articles.

In the present case the libelant was "paid off", according to his own testimony, within twenty-four hours after the S. S. City of Sydney completed the voyage (and the only voyage) covered by the shipping articles, and while the vessel was discharging her cargo at San Francisco. *The requirement of Section 4529, Rev. Stat., as to the payment of the seaman's wages had thus been met.*

The record further shows that after the voyage was over and the steward was "paid off" by the Shipping Commissioner at San Francisco, he continued in the service of the Company for a few days *under a custom of the Company* (Rec., 17-18), according to which custom he was to receive the wages theretofore paid him and one dollar a day for subsistence while in the home port. In other words, *according to the testimony of the libelant himself*, he continued in the employ of the Steamship Company, *not under the shipping articles*, because he had been "paid off" under those articles, *but under a custom of the Company*, or, as his own counsel, at the trial, characterized the situation then existing, under an *"implied contract"* to the effect stated. (Rec., 17.)

The record further shows that, prior to the trial, it never entered the minds of either libelant or his counsel that the shipping articles covering the previous voyage were still in force, that view apparently having been suggested to them, for the first time, by the trial court. The proof of this lies in the fact that the libel makes no reference whatever to the shipping articles covering the previous voyage, but, on the contrary, bases the right of the libelant to recover upon an *entirely new agreement* (not in writing or print as required by the statute) alleged to have been entered into between the Pacific Mail Steamship Company

and the libelant in September, 1913, upon the completion of the voyage covered by the shipping articles, which new agreement was *for another and different voyage*, and *for a different consideration*, said libel further alleging that, "in pursuance of said agreement the libelant entered into the service of the respondent as such chief steward on board the said steamship *on or about the forenoon of the twenty-fifth day of September*, in the year aforesaid", that being the day on which Schmidt had been "paid off" by the Shipping Commissioner under the shipping articles executed the preceding July for the previous voyage. So also, the exceptions filed by the libelant to the Company's answer attack the plea of set-off made by the Company on the ground that the matters set up therein were not matters "arising out of the cause of action or transaction or contract set forth in the libel, to wit, the cause of action for mariner's wages on a *contract entered into on the twenty-fifth of September*, in the year nineteen hundred and thirteen, and terminated on the first day of October, in the year aforesaid." (Rec., 10.) It was not until the trial court overruled these exceptions that counsel for libelant undertook to contend that the former contract was still in force at the time of his discharge from the service of the company.

Even at the trial, counsel for libelant (Mr. Ryan) showed his real understanding of the situation to be that the shipping articles were at an end. Thus, on page 20 of the Record, he makes the following statement:

> "Mr. Ryan: But, your honor, he was on the vessel before he signed shipping articles to Balboa *and he was on the vessel after he had been released from the shipping articles*, and it is our contention that these articles may have been lost between those times."

The very situation shown to exist here arose in the case of *The Queen* v. *The Judge of the City of London Court and*

Owners of the S. S. "Michigan", 2 Law Rep. Q. B. D. 339, which is cited in the opinion of the majority of the Circuit Court of Appeals in this case upon the proposition that the services rendered by the libelant here were maritime in character. In that case, as the report states, the chief mate of the vessel, "*after having been paid off and without signing any fresh articles* for the outward voyage, remained on board by the direction of the owner at the same rate of wages as he had received while at sea, with the addition of 2s. 6d. a day for victualling money while the vessel was in port." It is stated that the mate remained on board for the purpose of superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage, and continued on board for the purpose of superintending certain repairs to the vessel after it was docked for the purpose. The owner having become bankrupt, the mate libeled the vessel for the wages and victualling money so earned. The question was whether his claim was a maritime one in view of the fact, (found by the lower court) that the plaintiff, "*not having been on the ship's articles at the time*, was not a seaman within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. 104)." It was held by the appellate court that the claim was none the less maritime. So, here, the steward's claim for his earnings while the "City of Sydney" was in port may be maritime, but not being covered by the shipping articles Section 4529, Rev. Stat. had no application thereto.

Manifestly the courts below had no power to extend the shipping articles covering the previous voyage, contrary to the mutual understanding and intention of the parties thereto, as they did; and manifestly also, for what has been above shown, Section 4529, Revised Statutes, has no application to the situation arising between the parties after Schmidt had been "paid off" for the voyage covered by those Articles.

The fact that this record does not show that all the provisions of Sections 4549 to 4553, Revised Statutes, were complied with in discharging the libelant is immaterial. For a failure to observe the requirements of those sections the master or owner of the vessel may be liable to the penalty provided therein, which in each instance is not to exceed fifty dollars; but that is a matter wholly apart from the situation dealt with by Section 4529.

II.

The "City of Sydney" was engaged in the Coastwise Trade.

It is immaterial whether the "City of Sydney" was engaged in the coastwise or foreign trade, for while the provisions of amended Sec. 4529 are not exactly the same with respect to both classes of vessels, their essential purport is the same, namely, that a seaman shall be paid his wages promptly upon the conclusion of the voyage covered by the shipping articles, the only material difference being that allowance is made in respect to a vessel engaged in foreign trade for the time required to discharge its cargo.

It may be of interest, however, to the court to be advised of the following considerations indicating that the "City of Sydney" was engaged in the coastwise trade, as to which class of vessels Section 4529 provides that a seaman shall be paid his wages "*within two days after the termination of the agreement under which he shipped*", if not theretofore discharged, which requirement was duly met in this case.

The record shows that the "City of Sidney" was trading between San Francisco, Cal. and Balboa, in the Canal Zone. As stated by the District Court in its opinion (Rec., 34):

> "The 'City of Sidney' makes regular trips between those ports."

The City of Ancon, referred to in the shipping articles, is also in the Canal Zone, not far from Balboa. Both of these places are now domestic ports, and have been since the United States acquired the Canal Zone from the Republic of Panama. They are both located on the Pacific Ocean side of the Isthmus.

Under the treaty with Panama of November 18, 1903 (33 Stat. 2234), by which the Canal Zone was acquired, the "use, occupation and control" of the Zone was granted to the United States is perpetuity, for the purposes of the Canal, *with the exception only of the cities of Panama and Colon and the harbors adjacent to said cities*, and also the use occupation and control, in perpetuity of any other lands and waters outside of the said Zone which might be necessary for the purposes of the enterprise. (Art., II.) And by Art. III of the treaty the Republic of Panama granted the United States complete *sovereignty* over this territory.

Both Ancon and Balboa are well within the limits of the Canal Zone, as a glance at the map will show. Hence they have been, since the treaty, by which they were acquired, domestic ports of the United States.

In the Act of August 24, 1912 (37 Stat. 560), Congress provided for the operation of the Canal and the government of the Canal Zone. Sec. 5 of that Act authorized the President to prescribe the tolls to be levied by the Government of the United States for the use of the Canal, but provided that—

> "No tolls shall be levied upon vessels engaged in the coastwise trade of the United States."

That same Act and section also amended Sec. 4132, Rev. Stat., which describes the vessels entitled to registration as American vessels, by permitting the registration of certain "sea-going" vessels "wherever built, *which are to engage only in trade with foreign countries, or with the*

Philippine Islands and the islands of Guam and Tutuila." Said Sec. 4132, as thus amended by said Panama Canal Act, further provided that—

> "Foreign-built vessels registered pursuant to this Act shall not engage in the coastwise trade."

The exception of vessels engaged in the coastwise trade from tolls for passing through the Panama Canal, contained in this Act, as is well known, was repealed by the Act of June 15, 1914 (38 Stat. 385).

The point we wish to make is that by these provisions in the Panama Canal Acts Congress has recognized that trade between American ports through the Canal is *coastwise* or domestic trade, and that it has also, in the amendment to Sec. 4132, Rev. Stat., as to the registration of vessels, contained in the Panama Canal Act of August 24, 1912, supra, *treated the Philippine Islands and the Islands of Guam and Tutuila as the only American possessions to be classed with foreign countries in the matter of trade and commerce.*

This is in line with the recognition and treatment by Congress of trade with Porto Rico and Hawaii, referred to in *Huus* v. *New York & Porto Rico Steamship Co.*, 182 U. S. 392, where it was said (p. 396), with respect to Porto Rico, that "trade with that island is properly a part of the domestic trade of the country *since the treaty of annexation,* and is so recognized by the Porto Rican or Foraker Act." It was further said in that case (*ib.*, p. 396):

> "That the words 'coasting trade' are not intended to be strictly limited to trade between ports of the United States is also evident from Rev. Stat. Sec. 4358, wherein it is enacted that 'the coasting trade between the territory ceded to the United States by the Emporer of Russia, and any other portion of the United States, shall be regulated in accordance with

the provisions of law applicable to such trade between any two great districts'."

And after referring to the legislation enacted by Congress with respect to Hawaii, that opinion concludes (*ib.*, p. 397):

> "This use of the words 'coasting trade' indicates very clearly that the words were intended to include the *domestic trade of the United States upon other than interior waters.* The District Court was right in holding that the Ponce was engaged in the coasting trade, and that the New York pilotage laws did not apply to her."

III.

As to whether there was sufficient cause for the Company's withholding the amount due the steward for the services rendered by him in port, after the conclusion of the voyage

As pointed out in the brief filed in support of the petition for the writ of certiorari (pp. 15-17), the authorities are unanimous upon the proposition that the statute, in order to avoid the running of the penalty, only requires a *fair* or *reasonable* excuse for refusing to pay the seaman his wages within the time specified therein, and not that the cause for delay shall be *legally* sufficient. But while recognizing this to be so, the courts below have nevertheless held, in effect, that the action of the Company in charging the steward with the loss of certain silverware, presumably occurring during the voyage, was *arbitrary* and *unreasonable.* We submit that this conclusion is not justified.

While to one unacquainted with the situation it might seem rather harsh for the Company to require the steward to account for the lost articles, in this case of small value, a moment's reflection will satisfy the mind of an unbiased

person that the rule sought to be enforced by the Steamship Company is both just and reasonable, for unless some officer of the ship were held accountable for the safe custody of such articles, general carelessness and negligence with regard thereto would ensue, and the losses suffered by the Company from such causes throughout its entire service would be very great.

The testimony shows that the libelant was fully aware of the custom of the Company and of his own responsibility in this regard when he assumed the position of chief steward of the S. S. City of Sydney.

We quote the following from the testimony of Mr. Veazie, the port steward of the Pacific Mail, who testified that he had recommended Schmidt's employment as chief steward, and that he had taken him over to the boat where they met Mr. Thurlow, until then the chief steward (Rec., 25-28):

> Q. What occurred, if anything, on the boat, with respect to property in the steward's department, between you and Mr. Thurlow and Mr. Schmidt?
>
> A. The ship's equipment-book was up at the auditor's office at the time and so I had my copy in my office there and I took that over with me and I told Mr. Thurlow to turn the silver over to Mr. Schmidt and after checking it up to let me know, and I left the book there with them.
>
> Q. And then you went away?
>
> A. I went back to the office; yes, sir.
>
> Q. And that is all you know about that?
>
> A. About that particular circumstance, yes.
>
> Q. Before the ship sailed did Mr. Schmidt come to you to talk about any property in the steward's department?
>
> A. I think later in the day, or the next morning, I saw him and I asked him how was the silver, and he said the spoons were short from the last voyage and they were being repaired from the general stores, and he would get them with a receipt to sign before sailing.
>
> Q. And do you know whether he got them or not?
>
> A. He did, yes, sir.

Q. After that did you have any conversation with him concerning the stores in his department, before sailing?

A. Nothing more than just a general inquiry about ——he found things, and what to do on the voyage and certain things to look after.

Q. Did he state whether or not he had gone over the matter and found the property that should be there in his department?

A. *He stated to me that everything was all right, and I gave him this book to check up by.*

Q. *Mr. Schmidt was an old employee of the company for a long time in the Steward's department* and in the Butcher department, was he?

A. Yes, sir.

* * * * * *

Cross-examination.

Mr. Ryan:

Q. You do not know of your own knowledge whether Mr. Schmidt took an inventory of that property before he left on the voyage to Balboa, or not?

A. Nothing more than his word that everything was all right.

Q. He did not say that he took an inventory?

A. No, he did not use those words.

Q. You don't know whether he did or not?

A. No, sir.

Q. No one ever told you that he took an inventory?

A. *He was left with instructions to take an inventory of the silver, and the book was left there with the two stewards.*

Q. *Was he supposed to take an inventory of all the silver in his department, the large silver and everything.*

A. *Yes, you do on all ships when you make a change.*

Q. Is it usual for a man to do that when he is employed only two days before the vessel sails?

A. Certainly, if it is only one day.

Q. Is he not supposed to be working at other employment during that time?

A. He has other men doing the work around the ship; he only supervises.

Q. Is he not supposed to superintend that and see that it is done properly?

A. Not necessarily. The silver is a very important item.

Q. In other words, he has to go personally, when he is employed as steward, and go over everything in his department and check it up with the equipment-book?

A. It is his duty to go over the silver, yes.

* * * * * * *

A. *The silverware is checked up at the completion of the voyage.*

Q. And each one of those checked up his articles with you, or made a report to you?

A. Yes, sir.

Q. Did you keep a written memorandum of what the amount was?

A. *If there is any shortage it is charged to them and it is replaced.* (41)

Q. But do you keep a written memorandum whether it is all right, or not?

A. We don't take their word for it; it is put out on the dining-room tables and counted piece by piece.

Q. *Each steward that goes out tells you that his silverware is all right or not all right before he goes, does he?*

A. *Yes, sir.*

Q. Approximately 15 or 20 of those stewards made such reports to you between the time this vessel left for Balboa and the time when she came back?

A. It is impossible to make any other report.

The Court:

Q. *When they come back they count the silver out on the table?*

A. *Yes, sir.*
Q. But before they go you take their word for it?
A. If they are not changed; it is in their possession all the time.
Q. In this case you took Mr. Schmidt's word for the presence of the silver on board?
A. *He was responsible for it. He had orders to check in with the old steward.*

Mr. Ryan:

Q. Who is the head of the Commissary Department, the steward or the purser?
A. The purser.
Q. Why do you say then that the steward is responsible for it?
A. *The steward is personally responsible for it; it is in his possession.*

* * * * * *

The Court:

Q. Then he is, in your judgment, and in the judgment of the company an insurer of the silver, for anything short of shipwreck?
A. *It is a valuable article on the ship, and he is supposed to use all diligence in taking care of it;* somebody has to be held responsible for it, otherwise it would be pilfered.

Under such circumstances it was entirely natural that when, upon checking up the silverware upon the conclusion of this particular voyage, a number of articles of silverware were found to be missing, the Company should, in accordance with its custom, (with which Schmidt, because of his long service in the steward's department, was presumably fully acquainted) charge the same against his account. Certainly there was nothing arbitrary and unreasonable about such action, even if it was not legally justified.

IV.

Even if the Statute applies, Libelant's claim to the penalty was merged in the judgment of the District Court.

The decision of this court in *Massachusetts* v. *Western Union Telegraph Co.* (141 U. S. 40) is decisive of this point, as pointed out by Judge Dietrich in his dissenting opinion (Rec., 57-58). The statute there involved provided for the recovery of certain taxes due the State by a corporation "with interest at the rate of twelve per centum until the same are paid," and was therefore quite as explicit in this respect as Sec. 4529, Rev. Stat.

In their brief in opposition to the petition for a writ of certiorari in this case, counsel for the respondent cite this case upon another point, but do not attempt to distinguish it in this regard; nor do they discuss the settled rule as to the merger of a claim in a judgment stated with approval in *United States* v. *Price*, 9 How. *94.

In this connection it is to be observed that the Record shows that petitioner, on July 1, 1914, and after the decision of the Court of Appeals, made a motion in that court for an order directing that it be permitted to deposit in the registry of the District Court, or pay to the appellee or his proctor, the amount of $30.22 wages decreed by the District Court in favor of the appellee, with interest thereon at 7 per cent. per annum to date of such payment or deposit, and $38.35, the amount of the proctor's fee and costs of appellee in the District Court, at the same time reserving its right to further prosecute its appeal in said court and in this Court. (Rec., 63-64.)

This motion, the Record shows, was not granted, but, on the contrary, was in effect denied, as at the following October Term the Court of Appeals entered an order thereon

(which appellant did not comply with) requiring the company to pay the appellee the amount of the judgment as rendered by the District Court (which included the amount demanded as wages *and the statutory penalty for delay* to the date of such judgment, together with legal interest thereon), *and also requiring the appellant to deposit the additional amount due as penalty, according to the decision of the Court of Appeals,* pending and subject to the judgment of this court if it took the case up by certiorari. (Rec., 65.) Said order also contained the following provision (Rec., 65):

> "and it is further ordered that upon such payments and deposit being made by appellant the running of said penalty shall cease insofar as the judgment of this court is concerned."

In other words, the Court of Appeals declined to grant the Steamship Company any protection against the running of the penalty, unless it would deposit in the registry of the court not only the original amount claimed by libelant, including proctor's fee, interest and costs, but *all the penalties which, according to the view of the statute taken by the Court of Appeals, had accrued down to the time of entering its own decree;* and this notwithstanding, as we are advised, the company had given a supersedeas bond covering any judgment that might be finally rendered against it.

Finally, we wish to call the attention of this court again to the fact that the libelant took no appeal from the judgment of the District Court, and that (as was noted by Judge Dietrich in his dissenting opinion), the case was not before the Court of Appeals for trial *de novo,* and it had no authority, so far as the appellee was concerned, to do more than affirm the judgment of the District Court.

We quote the following from Bendict's Admiralty (4th ed., 1910):

> "SEC. 566. Until the establishment of the Circuit Courts of Appeal in 1891, review of the decree of the District Court was had in the Circuit Court, and such appeal was a new trial, new pleadings could be put in, new proofs taken, the libelant opened and closed the argument, as in the court below, and the Circuit Court executed its own decrees.
>
> The Circuit Court of Appeals Act created a court which was entirely a court of review, and which did not execute its own decrees. Assignments of error were required, and the statute, and the general rules propounded for the Circuit Courts of Appeal by the Supreme Court, made no provision for new pleadings or new evidence. . . . "

In *The Lucille*, (19 Wall. 73), emphasis is laid by Mr. Justice Miller upon the fact that in the case of an appeal from the District to the Circuit Court, as formerly allowed—

> "A new trial, completely and entirely new, with other testimony and other pleadings if necessary, or if asked for, is contemplated,—a trial in which the judgment of the court below is regarded as though it had never occurred. A new decree is to be made in the Circuit Court, and the record remains there. . . . The case is not sent back to the District Court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it."

A different view from that here contended for has been expressed in the following cases:

Mundon S. S. Line v. *Miramar S. S. Co.*, 167 Fed. 960 (C. C. App. 2d Ct.).
The Nyack, 199 Fed. 383 (C. C. App. 7th Ct.).

But these cases, we submit, ignore the essential difference between the old Circuit Court and the Circuit Court of Appeals, pointed out by Bendict, the latter being entirely a court of review while the former was a trial court.

V.

We respectfully submit, therefore,—

(1) Section 4529, Rev. Stat., has no application whatever to this case, because the obligation imposed thereby upon the Steamship Company with respect to the voyage covered by the shipping articles had been fully met.

(2) Although the plea of set-off may not have been well founded in law, the facts and circumstances of this case show "sufficient cause", within the meaning of the statute, for the company's refusing to pay libelant the amount due him pending a judicial determination of the question as to the application of the statute and the respective rights of the parties, and therefore the most libelant is entitled to recover is the amount of his wages and subsistence while he was in port, and costs.

(3) In no event should libelant be allowed to recover more than the amount of the judgment of the District Court, with legal interest from the date thereof.

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APPENDIX.

STATUTES.

Section 4529, Revised Statutes, as amended by an Act approved December 21, 1898, chap. 28 (30 Stat. 755, 756), provides:

SEC. 4529. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he shipped, or at the time when such seaman is discharged, whichever first happens; and in the case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account of wages, a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to the masters or owners of any vessel the seaman on which are entitled to share in the profits of the cruise or voyage.

This section as it originally appeared in the Revised Statutes read:

SEC. 4529. The master or owner of every vessel making voyages from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall pay to every seaman his wages, within two days after the termination of the agreement, or at the time such seaman is discharged, whichever first happens; and, in case of vessels making foreign voyages, within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account, a sum equal to one-fourth part of the balance due to him. Every master or owner who neglects or refuses to make payment in manner hereinbefore m: ntioned, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond

the respective periods; which sum shall be recoverable as wages in any claim made before the court. But this section shall not apply to the masters or owners of any vessel the seaman on which are entitled to share in the profits of the cruise or voyage.

It will be observed that the original Section 4529 did not include vessels making coasting voyages, other than those bound from ports on the Atlantic to ports on the Pacific and *vice versa;* also that the penalty for delay in paying a seaman his wages was different.

The only thing explanatory of the changes made in Section 4529, Rev. Stat., by the Act of December 21, 1898, *supra,* is contained in the House Report No. 1657, 55th Cong. 2nd Sess., accompanying Senate Bill 95, which became said Act. That report quotes the following from the report of the same committee (on Merchant Marine and Fisheries) in the 54th Congress on H. R. 6399, covering the same subject:

Section 5 (4529 R. S.): This section of the bill increases from one-fourth to one-third the amount of balance of wages due the seamen, to which he is entitled immediately upon discharge, and, in general, provides for prompter payment of the wages of seamen.

By the Act of March 4, 1915 (38 Stat. 1164), chap. 153, sec. 3, Section 4529, Revised Statutes, was amended so as to make the penalty for delay in paying a seaman his wages "a sum equal to *two* days' pay for each and every day during which payment is delayed", etc. This Act was passed subsequent to the transactions here involved.

Sec. 4530, Rev. Stat., as amended by Section 5 of the Act of December 21, 1898, chap. 28 (30 Stat. 756) provides:

"Sec. 4530. Every seaman on a vessel of the United States shall be entitled to receive from the master of the vessel to which he belongs one-half part of the wages which shall be due him at every port where such vessel, after the voyage has commenced, shall load or deliver cargo before the voyage is ended unless the contrary be expressly stipulated in the contract; and when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him as provided in section forty-five hundred and twenty-nine of the Revised Statutes."

The pertinent provisions of the Revised Statutes on the subject of shipping articles, read (in part):

Sec. 4511. The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American

possessions, or the West India Islands, or the republic of Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this Title, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:

First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.

Second. The number and description of the crew, specifying their respective employments.

Third. The time at which each seaman is to be on board, to begin work.

Fourth. The capacity in which each seaman is to serve.

Fifth. The amount of wages which each seaman is to receive.

Sixth. A scale of the provisions which are to be furnished to each seaman.

Seventh. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which may be sanctioned by Congress as proper to be adopted, and which the parties agree to adopt.

Eighth. Any stipulations in reference to advance and allotment of wages, or other matters not contrary to law.

Sec. 4512. The following rules shall be observed with respect to agreements:

First. Every agreement, except such as are otherwise specially provided for, shall be signed by each seaman in the presence of a shipping-commissioner.

Second. When the crew is first engaged the agreement shall be signed in duplicate, and one part shall be retained by the shipping-commissioner, and the other part shall contain a special place or form for the description and signatures of persons engaged subsequently to the first departure of the ship, and shall be delivered to the master.

Third. Every agreement entered into before a shipping-commissioner shall be acknowledged and certified under the hand and official seal of such commissioner. The certificate of acknowledgment shall be indorsed on or annexed to the agreement; and shall be in the following form: . . .

Table A, which gives the form of agreement required by 4511, Rev. Stat., follows Sec. 4612, and reads:

TABLE A.

FORM OF ARTICLES OF AGREEMENT.

UNITED STATES OF AMERICA.

(Date and place of first signature of agreement, including name of shipping-office):

It is agreed between the master and seamen or mariners of the _____, of which _____ is at present master, or whoever shall go for master, now bound from the port of _____, _____, to _____, _____, (here the voyage is to be described, and the places named at which the vessel is to touch, or if that cannot be done, the general nature and probable length of the voyage is to be stated).

And the said crew to conduct themselves in an orderly, faithful, honest and sober manner, . . .

Section 4520, Revised Statutes, covered the shipment of crews for vessels in the coasting trade. That Section provided:

Sec. 4520. Every master of any vessel of the burden of fifty tons or upward, bound from a port in one State to a port in any other than an adjoining State, except vessels of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or *vice versa*, shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman on board such vessel except such as shall be apprentice or servant to himself or owners, declaring the voyage or term of time for which such seaman shall be shipped."

This section was held not to have been repealed by the Act of June 9, 1874, chap. 260 (18 Stat. 641) in *United States* v. *Bain* (5 Fed. 192), and *The Lizzie M. Dun* (30 Fed. 927).

Section 2 of an Act approved June 19, 1886, chap. 421 (24 Stat. 79), provided that "shipping-commissioners may ship and discharge crews for any vessel engaged in the coastwise trade . . . at the request of the master or owner of such vessel", etc.

An Act approved February 18, 1895, chap. 97 (28 Stat. 667) provided:

Be it enacted, etc., That chapter eight hundred and one of the Public Laws of the Fifty-first Congress, entitled "An Act to amend the Act relative to shipping commissioners," approved August nineteenth, eighteen hundred and ninety, is hereby amended so as to read as follows:

"When a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade, or the trade between the United States and the Dominion of Canada, or New Foundland, or the West Indies, or Mexico, as authorized by section two of an Act approved June nineteenth, eighteen hundred and eighty-six, entitled "An Act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen, and owners of vessels, and for other purposes," *an agreement shall be made with each seaman engaged as one of such crew in the same manner as is provided by Sections four thousand five hundred and eleven and four thousand five hundred and twelve of the Revised Statutes*, not however including the sixth, seventh and eighth items of Section four thousand five hundred and eleven; and such agreement shall be posted as provided in Section four thousand five hundred and nineteen, *and such seamen shall be discharged and receive their wages as provided by the first clause of Section four thousand five hundred and twenty-nine* and also by Sections four thousand five hundred and twenty-six, four thousand five hundred and twenty-seven, four thousand five hundred and twenty-eight, four thousand five hundred and thirty, four thousand five hundred and thirty-five, four thousand five hundred and thirty-six, four thousand five hundred and forty-two, four thousand five hundred and forty-three, four thousand five hundred and forty-four, four thousand five hundred and forty-five, four thousand five hundred and forty-six, four thousand five hundred and forty-seven, four thousand five hundred and forty-nine, four thousand five hundred and fifty, four thousand five hundred and fifty-one, four thousand five hundred and fifty-two, four thousand five hundred and fifty-three and four thousand five hundred and fifty-four of the Revised Statutes; but in all other respects such shipment of seamen and shipping agreement shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner: *Provided*, That the clothing of any seaman shall be exempt for attachment, and that any person who shall detain such clothing when demanded by the owner shall be liable to a penalty of not exceeding one hundred dollars."

The origin of the several provisions of existing law requiring seamen to be shipped under written or printed contracts only, and to be paid their wages upon the termination of the voyage or engagement covered thereby, is to be found in the Act of July 20, 1790, chap. 29 (1 Stat. 131), which provided:

Section 1. *Be it enacted, etc.*, That from and after the first day of December next, every master or commander of any ship or

vessel from a port in the United States to any foreign port, or of any ship or vessel of the burthen of fifty tons or upwards, bound from a port in one state to a port in any other than an adjoining state, *shall, before he proceed on such voyage, make an agreement in writing or in print,* with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners) *declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped.* And if any master or commander of such ship or vessel shall carry out any seaman or mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seaman and mariner, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping: *Provided* such seaman or mariner shall perform such voyage: or if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one-half to the use of the person prosecuting for the same, the other half to the use of the United States: and such seaman or mariner, not having signed such contract, shall not be bound by the regulations, not subject to the penalties and forfeitures contained in this act.

Section 2. *And be it (further) enacted,* That at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall so ship and subscribe, shall render themselves on board, *to begin the voyage agreed upon.* . . .

* * * * * *

Sec. 6. *And be it (further) enacted.* That every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong, one-third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract: *and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract;* and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and the seaman or mariners touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his

residence, then, for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackle, furniture and apparel, according to the course of admiralty courts, to answer for the said wages: . . .

The provisions of this Act were subsequently embodied in the Act of June 7, 1872, chap. 322 (17 Stat. 262), providing for the appointment of Shipping Commissioners, from Act which the several provisions of the Revised Statutes above quoted were directly taken.

Chapter Four of Title LIII, Revised Statutes, upon the subject of the "Discharge" of merchant seamen, provides:

Sec. 4549. All seamen discharged in the United States from merchant vessels engaged in voyages from a port in the United States to any foreign port, or, being of the burden of seventy-five tons or upward, from a port on the Atlantic to a port on the Pacific, or vice versa, shall be discharged and receive their wages in the presence of a duly authorized shipping-commissioner under this Title, except in cases where some competent court otherwise directs; and any master or owner of any such vessel who discharges any such seaman belonging thereto, or pays his wages within the United States in any other manner, shall be liable to a penalty of not more than fifty dollars.

Sec. 4550. Every master shall, not less than forty-eight hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged before a shipping-commissioner, to such shipping-commissioner, a full and true account of his wages, and all deductions to be made therefrom on any account whatsoever; and in default shall, for each offense, be liable to a penalty of not more than fifty dollars. No deduction from the wages of any seaman except in respect of some matter happening after such delivery shall be allowed, unless it is included in the account delivered; and the master shall, during the voyage, enter the various matters in respect to which such deductions are made, with the amounts of the respective deductions as they occur, in the official log-book, and shall, if required, produce such book at the time of the payment of wages, and, also, upon the hearing, before any competent authority, of any complaint or question relating to such payment.

Sec. 4551. Upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of discharge, specifying the period of his service and the time and place of his discharge, in the form marked Table B in the schedule annexed to this Title; and every master who fails to sign and give to such seaman such certificate and discharge, shall, for each such offense, incur a penalty not exceeding fifty dollars. But whenever the master shall discharge his crew or any part thereof in any

collection-district where no shipping-commissioner has been appointed, he may perform for himself the duties of such commissioner.

Sec. 4552. The following rules shall be observed with respect to the settlement of wages:

First. Upon the completion, before a shipping-commissioner, of any discharge and settlement, the master or owner and each seaman, respectively, in the presence of the shipping-commissioner, shall sign a mutual release of all claims for wages in respect of the past voyage or engagement, and the shipping-commissioner shall also sign and attest it, and shall retain it in a book to be kept for that purpose, provided both the master and seaman assent to such settlement, or the settlement has been adjusted by the shipping-commissioner.

Second. Such release, so signed and attested, shall operate as a mutual discharge and settlement of all demands for wages between the parties thereto, on account of wages in respect of the past voyage or engagement.

Third. A copy of such release, certified under the hand and seal of such shipping-commissioner to be a true copy, shall be given by him to any party thereto requiring the same, and such copy shall be receivable in evidence upon any future question touching such claims, and shall have all the effect of the original of which it purports to be a copy.

Fourth. In cases in which discharge and settlement before a shipping-commissioner are required, no payment, receipt, settlement, or discharge otherwise made shall operate as evidence of the release or satisfaction of any claim.

Fifth. Upon payment being made by a master before a shipping-commissioner, the shipping-commissioner shall, if required, sign and give to such master a statement of the whole amount so paid; and such statement shall, between the master and his employer, be received as evidence that he has made the payments therein mentioned.

Sec. 4553. Upon every discharge effected before a shipping-commissioner, the master shall make and sign, in the form given in the table marked "B," in the schedule annexed to this Title, a report of the conduct, character, and qualifications of the persons discharged; or may state in such form, that he declines to give any opinion upon such particulars, or upon any of them; and the commissioner shall keep a register of the same, and shall, if desired so to do by any seaman, give to him or indorse on his certificate of discharge a copy of so much of such report as concerns him.

The foregoing provisions were taken from Sections 22, 23, 24, 27 and 28, respectively of the Shipping Commissioner's Act of June 7, 1872, Chap. 322, 17 Stat. 266.

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No. 323.

Supreme Court of the United States

OCTOBER TERM, 1915.

PACIFIC MAIL STEAMSHIP COMPANY, *Petitioner*,

vs.

ED. SCHMIDT.

REPLY BRIEF FOR PETITIONER.

WILLIAM R. HARR,
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San Francisco, Cal.,
Of Counsel

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

PACIFIC MAIL STEAMSHIP COMPANY, Petitioner, *vs.* ED. SCHMIDT. } No. 323.

REPLY BRIEF FOR PETITIONER.

I.

Respondent's first proposition is that the services sued upon were rendered "as a seaman on board an American vessel bound on a *foreign* voyage."

We maintain that at the time referred to he was not a seaman within the meaning of Sec. 4529, Rev. Stat., not having been shipped for any voyage, and that the Canal Zone, since its acquisition, has been domestic territory, and trade therewith domestic and coastwise trade, and "The City of Sydney" was engaged in such trade. We maintain further that Sec. 4529, Rev. Stat., only applies to vessels engaged in the coastwise trade *when the crew is shipped before a shipping commissioner.*

The expression in the shipping articles "such *other* ports and places in any port of the world as their master may direct", is to be construed in the light of the ports of destination and final discharge, stated in said articles, and the time in which the voyage was to be completed, namely not exceeding six months.

In *The Mermaid*, 115 Fed. 13, 15, like language was used in shipping articles for a *coastwise* voyage, and the Circuit Court of Appeals for the Ninth Circuit held that they should be construed as indicated.

The shipping articles used merely followed the printed form, which is adapted to foreign voyages, and was doubtless originally framed for such voyages, but afterwards used where crews for coastwise voyages were shipped before U. S. Shipping Commissioners. *The City of Montgomery*, 210 Fed. 673.

Besides, Secs. 3126 and 3127, Rev. Stat., expressly authorize any vessel "registered in pursuance of the laws of the United States" to engage in the coasting trade and to touch at one or more foreign ports during the voyage, and it is customary for them so to do.

The right of *American*-built registered vessels to engage in the coastwise trade is further recognized by The Panama Canal Act of August 24, 1912, Sec. 5 (37 Stat. 560), which amended Sec. 41321, Rev. Stats., so as to permit the registration of certain foreign-built vessels, but provided that—

> "*Foreign*-built vessels registered pursuant to this Act shall not engage in the coastwise trade."

Opposing counsel have asked the court to take judicial notice of the fact that the "City of Sydney", the vessel here involved, is registered for the foreign trade, and that such register is a public record (Respondent's Brief, pp. 5-6). We also ask the court to take notice of that record and the fact that it shows that the "City of Sydney" was built in 1875 at Chester, Pennsylvania, her first Permanent Register being No. 12, dated December 13, 1875, and her last Permanent Register being No. 33, dated February 28, 1903, and that she is also entitled by virtue of her built and register to engage in the coastwise trade.

We are informed by the Commissioner of Navigation that no tonnage tax is exacted of vessels entering the United States from the Canal Zone, such Zone not being regarded as a "foreign port or place" within the meaning of the Act of August 5, 1909, chap. 6, Sec. 36 (36 Stat. 111), imposing such tax.

Recognizing the fact that the Canal Zone became domestic territory upon its acquisition by the United States, Congress by the Act approved March 2, 1905, chap. 1311, provided "that all laws affecting imports of articles, goods, wares, and merchandise and entry of persons into the United States from foreign countries shall apply to articles, goods, wares, and merchandise, and persons coming from the Canal Zone, Isthmus of Panama, and seeking entry into any State or Territory of the United States or the District of Columbia." (33 Stat. 843.)

In short, the Canal Zone is recognized as domestic territory, and trade therewith domestic trade, so far as the *navigation* laws are concerned, but for *customs* purposes it is treated as foreign, though in fact domestic territory.

Sec. 4529 Applies only to Vessels Engaged in the Coastwise Trade when Crews are Shipped by a Shipping Commissioner.

It should be noted that the Act of February 18, 1895, chap. 97 (28 Stat. 667), set out on pp. iv-v of the Appendix to our Supplemental Brief, only applied the first clause of Sec. 4529, among other Sections of the Revised Statutes relating to the discharge and payment of seamen to vessels engaged in the coastwise trade, *when the crew is shipped by a shipping commissioner*, as authorized by the Act of June 19, 1886, chap. 421 (24 Stat. 79). The Act of June 9, 1874, chap. 260 (18 Stat. 641), had repealed the Shipping Commissioner's Act of June 7, 1872, so far as concerned vessels

engaged in the coastwise trade. (*Inter-Island Steam Nav. Co.* v. *Byrne,* decided by this court December 20, 1915.

In amending Sec. 4529 by the Act of December 21, 1898, Congress simply made it conform to the situation produced by the Act of February 18, 1895, by including in the first clause thereof a provision with respect to coastwise vessels. The section as thus amended should not be held to apply to the shipment of a seaman when not made before a shipping commissioner. To do so would be contrary to the intention of Congress as thus shown and make Sec. 4529 alone apply to crews of coastwise vessels when *not* shipped before a shipping commissioner, of all the provisions of the Revised Statutes with relation to the discharge and payment of seamen.

II.

Answering respondent's second proposition, we submit that the custom of the Company with respect to charging the chief steward with the silverware entrusted to his care was a sufficient cause for withholding the wages due until he had made an accounting therefor. Although his shipping contract had expired, he was still responsible for the articles committed to his custody. We submit that the set-off was well pleaded and fully sustained by the evidence.

III.

Victualing money is no part of a seaman's wages, within the meaning of Sec. 4529, Rev. Stat. It is merely a provision for subsistence or maintenance.

In *Palace Shipping Co.* v. *Caine,* 97 L. T. 587 (House of Lords), all the Judges were of the opinion that an allowance for the maintenance of the seamen could not properly be included under the term "wages" as used in the corre-

sponding provisions of the English Merchant Shipping Act of 1894.

Any penalty allowed must therefore be limited to the amount due as wages and exclude the dollar a day allowed for subsistence. This the District Court failed to do.

IV.

The authorities cited by respondent (pp. 9-10 of Brief) in support of the proposition that interest *at any rate* may be allowed by the Circuit Court of Appeals merely hold that the allowance of interest (i. e. *legal* interest) is not an inevitable consequence of the affirmance of the decree below, but may be allowed or refused in the discretion of the court.

Even legal interest might well be refused in this case, since the Company ought not to be penalized for exercising its right of appeal.

As it is, on an original debt of $30.33 and an original judgment for $151.59 and costs ($36.25), respondent is claiming as damages, (by way of penalty or *interest*,) amounting to over four thousand dollars!

V.

Although respondent did not appeal, and claims that he could not appeal because the decree of the District Court "granted him all wages due at the date of its entry, and because he would thereby have waived all right to damages, or interest in the nature of damages, because of the delay" (p. 14 of his brief), he nevertheless asserts that there was "plain error not assigned" in the decree of the District Court which the Circuit Court of Appeals had power to correct, namely, that the decree of the District Court was erroneous in only allowing the penalty to run to the date thereof instead of to the date of payment.

Manifestly here was something in the decree on account of which he might have appealed, and not having appealed, we submit, he could be heard only in support of the decree in the Circuit Court of Appeals.

This was the rule of this court even prior to the Act of February 16, 1875, chap. 77 (18 Stat. 315), which limited its review in admiralty cases to questions of law arising on the facts as found by the Circuit Court.

> *The William Bagaley* (1866), 5 Wall. 377, 412.
> *The Quickstep* (1869), 9 Wall. 665, 672.
> *The Collector*, 6 Wheat. 194.

In *The William Bagaley, supra*, the court said:

> "Appellees are always heard in support of the decree, but they cannot have any greater damages than were assessed in the court of subordinate jurisdiction."

In *The Quickstep, supra*, the court said:

> "As the libellant did not appeal, and can therefore, only be heard in support of the decree, we are not required to consider whether the evidence convicts the canal-boat of fault."

In other words, the rule of this court at the time when it had unlimited jurisdiction upon an admiralty appeal, was that the decree below was to be regarded as final so far as an appellee was concerned who did not file a cross-appeal.

Certainly, in this case, where it is manifest that a penalty out of all proportion to the damages would be inflicted by setting aside the decree of the District Court for the benefit of the libellant, who did not appeal, no such action should be taken by the appellate court of its own motion.

In *Caine* v. *Palace Shipping Co.*, 10 Asp. M. C., N. S., 380, 385; 76 L. J., K. B., 292, relied on by respondent, the

libellant had filed a cross-appeal, claiming an allowance of the penalty to a later date than that allowed by the decree appealed from.

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